IN THE

Supreme Court of the United States

October term, 1978

NO. 78-1568

WILLIAM R. WINDERS,

Petitioner

V.

UNITED STATES OF AMERICA,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Lillard H. Mount
Richard M. Hutson, II
Mount, White, King, Hutson, Walker & Carden, P.A.
P.O. Box 2006
Durham, North Carolina 27702

James B. Maxwell
Maxwell and Freeman, P.A.
P.O. Box 3418
Durham, North Carolina 27702

FRED R. SURFACE & ASSOC. INC., HERITAGE BUILDING, RICHMOND, VA. (804) 643-7789

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IN THE

SUPREME COURT OF THE UNITED STATES

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No.

WILLIAM R. WINDERS,

Petitioner

v.

UNITED STATES OF AMERICA,

Respondent

PETITION FOR A WRIT OF CERTIORARI
TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

The Petitioner, William R. Winders (Defendant), respectfully requests that a Writ of Certiorari be issued to review the per curiam opinion of the United States Court of Appeals for the Fourth Circuit entered on January 30, 1979, and amended by order dated March 12, 1979.

OPINIONS BELOW

The per curiam opinion of the United States Court of Appeals for the Fourth Circuit (A. 1) is unpublished. The Court of Appeals denied a Petition for Rehearing (A. 6) on March 12, 1979, and amended its per curiam opinion filed January 30, 1979.

JURISDICTION

The jurisdiction of this Court is invoked under Title 28, United States Code

§1254(1). The Defendant seeks the review of the per curiam opinion of the Court of Appeals entered on January 30, 1979 (A. 1) and a Petition for Rehearing (A. 6) denied on March 12, 1979.

QUESTIONS PRESENTED

1. The Defendant was severely prejudiced and denied a fair trial by the trial court's refusal to grant a motion of severance from other co-defendants.

2. Without knowledge or notice of the borrowing record or status of Bobby R. Roberts or his corporate entities with First Federal Savings & Loan Association, the Defendant, William R. Winders, cannot be convicted of willfully misapplying the funds of First Federal Savings & Loan Association by conducting title examinations and disbursing proceeds of the association for the borrower.

A. At the time the Defendant Winders handled the funds, they were the borrowers' funds and not First Federal Savings & Loan Association's.

B. In conducting title examinations, the Defendant Winders did so on behalf of the borrower and not First Federal Savings & Loan Association.

C. Assuming the funds were not First Federal Savings & Loan Association's when received by Defendant Winders, he was not an agent or employee of the association and could not therefore misapply its funds.

STATUTES INVOLVED

The Defendant was convicted of willfully misapplying funds of an insured savings and loan association in violation of 18 U.S.C. §657 which reads as follows:

> Whoever, being an officer, agent or employee of or connected in any capacity with the Reconstruction Finance Corporation, Federal Deposit Insurance Corporation, National Credit Union Administration, Home Owners' Loan Corporation, Farm Credit Administration, Department of Housing and Urban Development, Federal Crop Insurance Corporation, Farmers' Home Corporation, the Secretary of Agriculture acting through the Farmers' Home Administration, or any land bank, intermediate credit bank, bank for cooperatives or any lending, mortgage, insurance, credit or savings and loan corporation or association authorized or acting under the laws of the United States or any institution the accounts of which are insured by the Federal Savings and Loan Insurance Corporation or by the Administrator of the National Credit Union Administration, or any small business investment company, and whoever, being a receiver of any such institution, or agent or employee of the receiver, embezzles, abstracts, purloins or willfully misapplies any moneys, funds, credits, securities or other things of value belonging to such institution, or pledged or otherwise intrusted to its care, shall be fined not more than $5,000 or imprisoned not more than five years, or both; but if the amount or value embezzled, abstracted, purloined or misapplied does not exceed $100, he shall be fined not more than $1,000 or imprisoned not more than one year, or both.

OTHER STATUTORY PROVISIONS

A. 18 U.S.C. §2 (A. 8)

B. 18 U.S.C. §371 (A. 8)

STATEMENT OF THE CASE

The Defendant, William R. Winders, was found guilty of conspiring to commit offenses against the United States in violation of 18 U.S.C. §657 by misapplying funds of a federally insured savings and loan association. The Defendant was tried together with four other defendants in the United States District Court for the Middle District of North Carolina, the trial commencing on January 19, 1977, and concluding on February 6, 1977. The Defendant was sentenced to three years' imprisonment and fined $22,000.00. The Defendant gave timely notice of appeal to the United States Court of Appeals and the record on appeal consists of 118 documents in pleading numbers, 193 exhibits and a transcript of over 3,000 pages.

The charges in the indictment grew out of loan transactions of First Federal Savings & Loan Association (First Federal) covering a period of some fifteen months in the years 1973 and 1974. The alleged

co-conspirators with Mr. Winders were W. W. Edwards, J. B. Harris, Bobby R. Roberts, and Robert D. Holleman.

W. W. Edwards was the President and Director of First Federal, having served as an officer for some eighteen years prior to the indictment. J. B. Harris was Secretary-Treasurer and a Director of First Federal and he also served with Edwards on First Federal's loan committee. Robert D. Holleman was counsel for First Federal, conducted title examinations for many of its borrowers and was active in disbursing funds in many of the alleged sham loans. The Defendant, Bobby R. Roberts, was a borrower of First Federal and was found guilty of being involved in these loan transactions.

The Government's primary theory of misapplication in these cases was that Bobby R. Roberts had borrowed funds from First Federal which approached the 10% maximum limit to any one borrower by federally insured savings and loan association prior to January 1973. It was the Government's contention that with this knowledge, Roberts made applications for additional loans through "sham" borrowers and that Edwards and Harris conspired with him to participate in those loans. It was the Government's further contention that the Defendant Holleman, as General Counsel for First Federal and an attorney who had long been active in title transactions for First Federal, participated in this misapplication. Mr. Winders had his law offices in First Federal, had done title examinations in the past for borrowers of First Federal and was involved in doing the examinations and had funds disbursed to him as "Trustee" in three of the loan transactions which

allegedly made up the conspiracy. He was indicted on this theory, found guilty in a joint trial with the other defendants by a jury, and in a per curiam opinion from the Court of Appeals, was found to be a "willing conduit" in the misapplication of First Federal's funds.

STATEMENT OF FACTS

The Defendant Winders is a licensed practicing attorney in North Carolina and was employed as title attorney in certain of the loans in question. The conviction of Winders is founded upon his involvement in three (3) mortgage loans. The loans are referred to as the R. G. Hancock loan, Bryant Roberts' Vance County loan and Bryant Roberts' Orange County loan. The uncontradicted evidence at the trial clearly established:

1. The Defendant Winders was not an employee, officer or member of the Board of Directors of First Federal.

2. The Defendant Winders had no knowledge of or association and connection with the loan applications for the loans of R. G. Hancock and Bryant Roberts.

3. The Defendant Winders was not a member of the loan committee which approved the disbursement of funds.

4. The Defendant Winders had not attended any Board of Directors meetings of First Federal.

5. Winders did not participate in the decisions to make the loans to R. G. Hancock and Bryant Roberts.

6. The Defendant Winders had not solicited, consulted or had any connection with the appraiser, Worth Lutz, who was charged with the responsibility of appraising the real property used as collateral.

7. The Defendant Winders' participation in the loans of R. G. Hancock and Bryant Roberts was as an attorney performing a title examination required by First Federal for which he was compensated a reasonable and normal attorney's fee.

8. The Defendant Winders received no other compensation other than his reasonable fee for the examination of title.

9. The Defendant Winders was not the attorney or general counsel for First Federal.

10. Winders had done title examinations for First Federal for many years prior to January 1973 and was highly regarded by First Federal for his competent handling of such transactions. In addition, he enjoyed a reputation in the legal community as an experienced and competent real estate attorney.

11. No instructions were given to Winders from First Federal as to what to do with the funds.

12. Winders did not request that the disbursements on the loans in question be made payable to him.

13. There is no evidence of collaboration between the other defendants and Winders.

14. There is no evidence to dispute that Winders properly protected First Federal's interests as a title examiner insuring that all prior liens were satisfied and First Federal's mortgage constituted a first lien on the property.

REASONS FOR GRANTING THE WRIT OF CERTIORARI

The Defendant Winders is not unaware that he is primarily asking the highest Court in this Country to review the factual circumstances surrounding his conviction in this case. While it is his firm conviction that the case law on the subject before the Court does not support his conviction, it is his primary contention that somewhere in our judicial process he is entitled to have at least one court look at the facts in this matter as they relate to William R. Winders, alone - not in concert with any other defendants or individuals - and determine, in that light, whether he has committed a crime.

This entire procedure began when federal agents uncovered certain irregularities in the bankruptcy proceeding involving Bobby R. Roberts' business enterprise. In that investigation, the FBI determined that there had been misapplication of the funds of First Federal and that the principal officers of that association, as well as their general counsel, were aware of these

misapplications when they encouraged and ultimately approved loans to "straw borrowers" on behalf of Roberts. In casting out their net of suspicious and criminal involvement, William R. Winders, a respected attorney in Durham whose primary practice was in real estate matters and who had worked with First Federal for many years, was hauled in. Since the date of his indictment, Mr. Winders has been asking every judicial body possible to consider his case individually and apart from the other four defendants. It was his contention with the FBI agents that he did not know of any regulations that were being violated and was not a knowing part of any plan to defraud the Federal Government or First Federal. This Petition represents his last effort to have that plea heard and fairly considered by some judicial body.

It is respectfully submitted that while this Petition may well rest primarily on factual considerations, it is an important question which has wide application and interest to all attorneys who engage in a real estate practice in states where attorneys continue to do title examinations and handle any funds for their clients (the borrowers) of federally insured savings and loan associations.

1. The Defendant was severely prejudiced and denied a fair trial by the trial court's refusal to grant a motion of severence from other co-defendants.

In order for the Defendant Winders to have his case fairly considered, he should not have been forced to have his case tried with the other defendants. The per curiam opinion fails to address the contention that this Defendant was prejudiced by the continued denial of a motion for severance and because this issue is at the core of his conviction, it should be considered.

Prior to trial and shortly after indictment, the Defendant Winders moved for severance of his trial from that of the other defendants. As grounds for this motion he asserted his limited involvement in the overall transaction (serving only as title examiner in each transaction in which he was involved), his lack of interest in or knowledge of the financial affairs of First Federal and the relatively short period of time of his transactions in relation to the overall alleged conspiracy. His motion was denied both before the trial and at all stages during the proceedings.

After indictment but prior to the commencement of trial, the decision of United States v. Mardian, 546 F.2d 973 (C.A.D.C., 1976) was rendered. The similarities in Fred Mardian's situation as compared to Bill Winders are striking and persuasive. Even accepting the principle that severance is a discretionary matter for the trial court, Opper v. United States, 348 U.S. 84, 75 S.Ct. 158, 99 L.Ed 101 (1954), our courts have "always kept in mind the problems inherent in trials of conspiracy cases involving numerous defendants". Mardian, supra, p. 977. There is always the risk of "transference of guilt" and that the guilt of any of the defendants might

"rub off" on others. It is respectfully submitted that the Court's failure to grant the severence motion of Winders in this case had this unwarranted prejudicial effect.

In Mardian, supra, the Court enacted two major areas of potential prejudice: (1) the short period of his involvement in the alleged conspiracy; and (2) the abundance of trial exhibits (particularly tape recordings) which failed to mention Mardian at all, but which were considered highly damaging to other defendants.

In the Watergate trials, the alleged conspiracy began around June 17, 1973, and continued until the indictment on March 1, 1974. Mardian resigned his position with CRP on July 21, 1973, and ceased any active participation in the alleged conspiracy at that time. He was involved, at most, one month in a nine-month conspiracy. Not counting Hancock, in which there was a solvent borrower who was never told he was not responsible and in which loan proceeds went primarily to pay off encumbrances, the conspiracy here was from April 3, 1973, until May 1974, when construction loans were made to questionably solvent borrowers and proceeds were disbursed prior to construction. Winders was involved in loan transactions involving Bryant Roberts between April 3, 1973, and April 12, 1973, only nine days out of thirteen months.

In Mardian, supra, there were 30 tapes introduced in which he was mentioned 5 times. In Winders' situations, there were reams of material and exhibits introduced involving loans to Lunsford, Thomas, Thompson and Northcutt which never mentioned Winders' name and in which he was

not involved.

In United States v. Kelly, 349 F.2d 720 (2nd Cir., 1965), the standard was established that severence should be granted when the evidence against one or more of the defendants is "far more damaging" than the evidence against the moving party. Under any impartial view of the evidence in this case, the fact occurred here and severance should have been granted.

The Court is under a "continuing duty at all stages of the trial to grant a severance if prejudice does appear", Schaffer v. United States, 362 U.S. 511, 516, 80 S.Ct. 945, 4 L.Ed.2d 921 (1960), and the Court's failure to have granted the motion at any stage in the proceeding compels a new trial for Winders because of the prejudicial effect that it had.

If Mr. Winders committed a crime, then the Government should be able to convict him of this in a separate trial. If the case law or facts would not support such a result in an individual trial, then the Government should not be allowed to benefit from "guilt by association" and violate the Defendant's due process by trying him with the alleged principals in this plot to defraud First Federal.

2. Without knowledge or notice of the borrowing record or status of Bobby R. Roberts or his corporate entities with First Federal Savings & Loan Association, the Defendant, William R. Winders, cannot be convicted of willfully misapplying the funds of First Federal Savings & Loan

Association by conducting title examinations and disbursing proceeds of the association for the borrower.

Since Winders was not an officer, agent or employee of First Federal, his conviction on the substantive counts had to rest on aiding and abetting. It is an essential element of the crime of aiding and abetting and conspiracy that the defendant knowingly participate in the illegal transaction and intend to facilitate its commission. There must be proof that the aider and abettor and conspirator had knowledge of the criminal activity and encouraged or participated in it. U.S. v. Tokoph, 514 F.2d 597 (10th Cir., 1975) and U.S. v. Thomas, 468 F.2d 422 (10th Cir., 1972). Submission to the jury is warranted only if there is enough evidence to show that the defendant knew of the wrongful activity of the principal and desired to forward it. U.S. v. Docherty, 468 F.2d 989 (2nd Cir., 1972)

In Docherty, supra, the Court held that the defendant was not guilty of aiding and abetting commission of willful misapplication of funds under 18 U.S.C. §656. The defendant in that case borrowed money on behalf of the loan officer making the loan and subsequently turned the funds over to him. The defendant also had knowledge that the loan officer could not borrow from the bank in that it was a violation of bank policy and regulations. The Court stated:

> "***It would follow that, to support a conviction for 'aiding and abetting' in a willful misapplication, the alleged

> aider or abettor must have knowledge that the officer intended to effect a conversion. The Court also stated in Britton, 107 U.S. at 667, 2 S.Ct. at 522, that the counts relating to the stock purchase '[charged] maladministration of the affairs of the bank, rather than criminal misapplication of its funds' and that, if the counts were held to be good, 'every official act of an officer, clerk or agent of a banking association, by which its funds were applied in a way not authorized by law, would be punishable....' It would seem to follow a fortiori that mere knowledge that the transactions here at issue violated a bank rule would not suffice to support a conviction for aiding and abetting." 468 F.2d at 993.

The defense of Winders is ever stronger than that of the defendant in the case of the U.S. v. Docherty, supra. In the instant case, Winders had no knowledge that a loan to Bobby Roberts was in violation of a regulation or rule of the Federal Home Loan Bank. Likewise, Winders had no knowledge of the appraisals, loan applications, and financial ability of the borrowers, which strengthens his defense and clearly demonstrates the lack of evidence sufficient to constitute a conviction as an aider, abettor and conspirator. The Defendant Winders, having no knowledge, could not willingly engage in a scheme to violate 18 U.S.C. §657.

Without explanation and in the face of Docherty, supra, the decision of the Court of Appeals rests on the rationale that "Holleman and Winders, both of whom were attorneys, conducted title examinations and disbursed the proceeds of loans for the association" and were "willing and knowing conduits of the funds".

The original per curiam opinion of January 30, 1979, read:

> "Holleman and Winders, both of whom were attorneys, conducted title examinations, closed loans and disbursed the proceeds thereof for the association." (emphasis added) (A. 4)

After filing a Petition for Rehearing, the Court, in its order denying the request, amended the per curiam opinion of January 30, 1979, to read:

> "Holleman and Winders, both of whom were attorneys, conducted title examinations and disbursed the proceeds of loans for the association." (emphasis added) (A. 7)

The Defendant, in the Petition for Rehearing, argued that all loans were closed by First Federal officials and not by him as attorney. This is in accordance with the established procedure of loan closings with savings and loan associations. When reviewing the records and argument by the Defendant, it is apparent that the Court of Appeals agreed with this conclusion and thereby amended their opinion. However, the Court of Appeals incorrectly concluded that

Winders "disbursed the proceeds of loans for the association". (emphasis added)

A. At the time the Defendant Winders handled the funds, they were the borrowers' funds and not First Federal's.

The Defendant Winders received funds drawn on the account of First Federal. These funds were delivered in the form of checks after promissory notes had been received by First Federal in exchange for the checks. The checks were payable to the Defendant Winders either as Trustee or attorney.

Once a promissory note was delivered to First Federal, any advancement of funds under said note became the funds of the borrower and not the association. First Federal exchanged its funds for the title to a promissory note signed by the borrower. Therefore, when the Dèfendant Winders received the funds, they were the funds of the borrower and any alleged misapplication is one of the borrowers' funds and not the association's funds in violation of 18 U.S.C. §657. The Government's own witness, a Federal Home Loan Bank Examiner, testified that the funds were those of the borrower and not the association.

The Defendant Winders was delivered funds by officials of the association. At this time all funds became the borrowers and were subject to the wishes of the named borrowers, not of First Federal. There was no testimony that the named borrowers instructed Winders

in disbursing the proceeds different than they were disbursed.

B. In conducting title examinations, the Defendant Winders did so on behalf of the borrower and not First Federal Savings & Loan Association.

In respect to title examinations and certifications, it appears that under North Carolina practice, the legal services were rendered for the borrower. The ethics opinions of the North Carolina State Bar, apparently overlooked by the Court of Appeals, fully supports this position.

For example, in CPR 108, dated April 15, 1977, the North Carolina Bar ruled that it is unethical for a lending institution to require that certificates of title for its loans be rendered only by one lawyer, when other qualified attorneys are available to render title opinions. Moreover, even when an attorney who certifies title has been named trustee in the deed of trust - as was the practice with First Federal - he does not become attorney for the lending institution. See CPR 136, dated October 27, 1977 (N.C. Bar, Vol. 24 #4, p.27) Cf. CPR 137, dated October 27, 1977 (N.C. Bar, Vol. 24 #4, p.27).

In January 1975, the North Carolina State Bar Council established a Special Committee on Real Estate Transactions. The Report of that Committee, submitted in January 1977, concluded that the State Bar

"should adopt the position that in the usual residential real estate transaction, unless the attorney otherwise elects and notifies the borrower, the attorney shall have as his client the borrower and additionally may, as a part of such representation, properly provide the necessary loan documentation and title assurance required by the lender. Also in those instances in which the attorney feels it is practical for him to represent multiple clients in a real estate transaction, that such can be done but only after appropriate notice to the parties". (N.C. State Bar, Vol. 24 #1, p. 9)

The position ultimately adopted by the State Bar Council in April 1977 was that in a residential real estate transaction the same attorney may represent borrower and lender, draw a deed for a seller and certify title to a title insurance company, CPR 100, dated April 15, 1977.

In this connection, it should be noted that when an attorney certifies title to a title insurance company, he is usually not considered the attorney "for" the title insurance company. Instead, he remains attorney for the person seeking issuance of the title insurance policy - who is paying the fee for his title examination and certification. In similar fashion, the certifications of title to First Federal did not make Winders attorney "for the Association". Nor did they disburse proceeds "for the

Association" as the per curiam opinion erroneously stated.

C. Assuming the funds were not First Federal Savings & Loan Association's when received by Defendant Winders, he was not an agent or employee of the association and could not therefore misapply its funds.

In Subparagraphs A and B of this Argument, it has been demonstrated that First Federal closed the loan transaction in which Winders was involved and that when he received the funds, they belonged to the named borrowers. The Court of Appeals apparently accepted this premise by the modification made to their per curiam opinion after this Defendant's Petition for Rehearing. Therefore, unless Winders was an agent or employee of First Federal, he could not misapply its funds when he received them for his clients, the borrowers.

In the opinion of the Fourth Circuit concluding that Winders was a "willing conduit" for the misapplication of funds, the Court of Appeals overlooked the decision of United States v. Musgrave, 444 F.2d 755 (5th Cir. 1971) which was relied upon by the Defendant and deals directly with the liability of an attorney prosecuted under the same statutes involved in the case at hand. There, the Court of Appeals held insufficient the evidence offered against the Defendant Bryant, a lawyer. Yet Bryant's involvement in the loan at issue in Musgrave was

far greater than that of the Defendant in the present case. The Court, in Musgrave stated:

> "It is common knowledge and practice that acting as a closing agent in a loan transaction does not create an agency or employer-employee relationship between the closing agent and the lending institution."

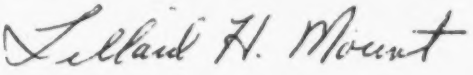
Winders' role in the loans was one of title examiner charged with the responsibility of examining the real estate titles and certifying that First Federal was secured by a first lien upon the collateral. The fee for said service was paid by the borrower and not by the association, and he was attorney for the borrower and not the association. Even if we conclude that Winders was the closing agent in the land transactions, there is not created a relationship sufficient to support a conviction under 18 U.S.C. §657. This principle was clearly established in the Musgrave case.

CONCLUSION

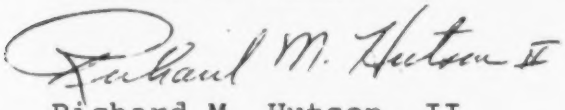
The importance of the legal principle in this case as it affects the legal profession in general and specifically, William R. Winders, an individual attorney practicing in Durham, North Carolina, demands a review by this Honorable Court. It is the opinion of counsel that each court that has considered "Winders' criminality" at any stage in the proceedings against him has questioned the same. This was no more clearly demonstrated than in arguments before the

Court of Appeals. There the Court took a keen interest in counsel's efforts to separate Winders from the other defendants. Even so, nine months later, he receives the same per curiam opinion as the other four defendants. It is respectfully submitted, and without malice toward the co-defendants, this Court should consider Winders' Petition separately and individually and grant the same.

Respectfully submitted,

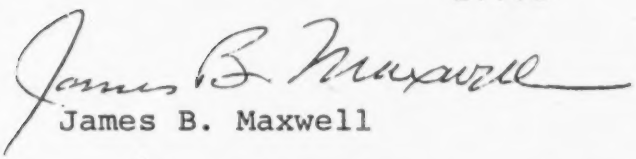


Lillard H. Mount



Richard M. Hutson, II

Mount, White, King,
Hutson, Walker &
Carden, P.A.
P. O. Box 2006
Durham, North Carolina
27702



James B. Maxwell

Maxwell and Freeman,P.A.
P. O. Box 3418
Durham, North Carolina
27702

Attorneys for Petitioner
William R. Winders

April 1979

CERTIFICATE OF SERVICE

I certify that, pursuant to Supreme Court Rule 33, I have served the foregoing Petition for a Writ of Certiorari to the Court of Appeals for the Fourth Circuit by mailing three copies, first class postage prepaid, to the Solicitor General, Department of Justice, Washington, D. C., 20530, and three copies to the Honorable H. M. Michaux, Jr., United States Attorney, at his office address, Box 1858, Greensboro, N. C. 27402.

This 13th day of April, 1979.

James B. Maxwell
Maxwell & Freeman, P.A.
Attorneys at Law
P. O. Box 3418
Durham, N. C. 27702
(919) 683-5591

APPENDIX A TO PETITION

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 77-1618

United States of America,

Appellee,

versus

Robert D. Holleman,

Appellant.

No. 77-1619

United States of America,

Appellee,

versus

William W. Edwards,

Appellant.

No. 77-1620

United States of America,

Appellee,

versus

John B. Harris,

Appellant.

No. 77-1621

United States of America,

Appellee,

versus

William R. Winders,

Appellant.

No. 77-1622

United States of America,

Appellee,

versus

Bobby R. Roberts,

Appellant.

Appeals from the United States District Court for the Middle District of North Carolina, at Durham. Robert E. Maxwell, District Judge.*

Argued May 4, 1978
Decided January 30, 1979

Before HAYNSWORTH, Chief Judge; RUSSELL, Circuit Judge, and FIELD, Senior Circuit Judge.

Robinson O. Everett and James B. Craven, III (Everett, Everett, Creech and Craven on brief) for Appellant in 77-1618; L. P. McLendon, Jr. (J.T. Williams, Jr., George W. House, Brooks, Pierce, McLendon, Humphrey and Leonard on brief) for Appellant in 77-1619; William D. McCaffrey

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* Chief Judge, United States District Court for the Northern District of West Virginia, sitting by designation.

(Eugene W. Purdom, Jordan, Wright, Nichols, Caffrey & Hill on brief) for Appellant in 77-1620; James B. Maxwell (Richard M. Hutson, II, Mount, White, King, Hutson on brief) for Appellant in 77-1621; Jerry L. Jarvis (William H. Murdock, Murdock Jarvis, LaBarre on brief) for Appellant in 77-1622; Allen Holt Gwyn, Jr., Assistant United States Attorney (H. M. Michaux, Jr., United States Attorney on brief) for Appellee in 77-1618 through 77-1622.

PER CURIAM:

On September 6, 1977, William W. Edwards, John B. Harris, Bobby R. Roberts, Robert D. Holleman and William R. Winders were variously charged in an eighteen count indictment returned by a grand jury for the Middle District of North Carolina. In Count One, all five defendants were charged under 18 U.S.C. § 371 with a conspiracy to misapply funds of First Federal Savings and Loan Association of Durham, North Carolina, a federally insured savings and loan association, and causing false entries and statements to be made in the records and reports of the Association in violation of 18 U.S.C. §§ 657 and 1006. The defendants, Edwards, Harris and Roberts were charged with thirteen substantive counts of misapplication in violation of Section 657. The defendant Holleman was jointly charged in five of the misapplication counts and the defendant Winders was charged in four of those counts. Edwards and Harris were also charged with three counts of making false entries in violation of 18 U.S.C. § 1006, and Holleman and Roberts were charged in

Count Eighteen with a violation of Section 1006.[1] The jury returned verdicts of guilty as to all defendants on the conspiracy charge; found Edwards and Harris guilty of the sixteen substantive offenses; Roberts guilty of the thirteen substantive offenses; Holleman guilty of four of the substantive offenses and not guilty of one, and Winders guilty of three of the substantive offenses and not guilty of one. Convicted pursuant to the jury's verdicts, the five defendants have appealed.

The charges in the indictment grew out of loan transactions of the Association covering a period of some fifteen months in the years 1973 and 1974. During all of that time William W. Edwards was the President and a director of the Association, having served as its managing officer for some eighteen years prior to the indictment. John B. Harris was Secretary-Treasurer and a director of the Association, and he and Edwards, together with a third director, served as the Association's loan committee. Holleman and Winders, both of whom were were attorneys, conducted title examinations, closed loans and disbursed the proceeds thereof for the Association.

We have carefully reviewed the record and in our opinion the evidence sufficiently established that during the period covered by the indictment Edwards and Harris caused the Association to

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[1] This count was dismissed during the course of the trial.

make over four million dollars in "sham" loans,[2] the proceeds of which were applied to the defendant Roberts' interests, and concealed the true nature of the loans from the Association's directors as well as the examiners of the Federal Home Loan Bank by disregarding the established procedures of the Association. While the attorneys, Winders and Holleman, were not the primary actors in the conspiracy, they were willing and knowing conduits of the funds which were passed along to Roberts, and participated in the concealment of the transactions in the records of the Association.

Perceiving no error in the conduct of the trial or in the instructions of the court, and finding the evidence sufficient to support the jury's verdicts, we affirm the convictions.

A F F I R M E D.

[2] See United States v. Gens, 493 F.2d 216 (1 Cir. 1974).

APPENDIX B TO PETITION

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 77-1618

United States of America,

Appellee,

versus

Robert D. Holleman,

Appellant.

No. 77-1619

United States of America,

Appellee,

versus

William W. Edwards,

Appellant.

No. 77-1620

United States of America,

Appellee,

versus

John B. Harris,

Appellant.

No. 77-1621

United States of America,

Appellee,

versus

William R. Winders,

Appellant.

No. 77-1622

United States of America,

Appellee,

versus

Bobby R. Roberts,

Appellant.

Appeals from the United States District Court for the Middle District of North Carolina, at Durham. Robert E. Maxwell, Chief Judge, Northern District of West Virginia, sitting by designation.

O R D E R

Upon consideration of the petition for rehearing, it is

ORDERED that the final sentence in the second paragraph on page three of the slip opinion is amended to read as follows: "Holleman and Winders, both of whom were attorneys, conducted title examinations and disbursed the proceeds of loans for the Association." The original opinion is reaffirmed in all other respects.

NOW, THEREFORE, with the concurrence of Chief Judge Haynsworth and Judge Russell, and no judge in active service having requested a poll upon the en banc suggestion, it is ADJUDGED and ORDERED that the petition for rehearing is denied.

/s/ John A. Field, Jr.
Senior U.S. Circuit Judge

March 12, 1979

APPENDIX C TO PETITION

18 U.S.C. § 2 (1970):

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

18 U.S.C. § 371 (1970):

If two or more persons conspire either to commit any offense against the United States, or do defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

18 U.S.C. § 657 (1970):

Whoever, being an officer, agent or employee of or connected in any capacity with the Reconstruction Finance Corporation, Federal Deposit Insurance Corporation, Home Owners' Loan Corporation,

Farm Credit Administration, Department of Housing and Urban Development, Federal Crop Insurance Corporation, Farmers' Home Corporation, the Secretary of Agriculture acting through the Farmers' Home Administration, or any land bank, intermediate credit bank, bank for cooperatives or any lending, mortgage, insurance, credit or savings and loan corporation or association authorized or acting under the laws of the United States or any institution the accounts of which are insured by the Federal Savings and Loan Insurance Corporation, or any small business investment company, and whoever, being a receiver of any such institution, or agent or employee of the receiver, embezzles, abstracts, purloins or willfully misapplies any moneys, funds, credits, securities or other things of value belonging to such institution, or pledged or otherwise intrusted to its care, shall be fined not more than $5,000 or imprisoned not more than five years, or both; but if the amount or value embezzled, abstracted, purloined or misapplied does not exceed $100, he shall be fined not more than $1,000 or imprisoned not more than one year, or both.

see

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